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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 316

JOHN CIVOLO, JOSEPH CIVOLO, PIERCE FERRAL, JOHN GA[illegible], EMIL KOPPENBERG, LOUIS KOVERY, SEYMOUR LASSOFF, HARRY MADOFFSKY, ALWARDUS MARKHOOF, SIDNEY MOSLER, EDWARD ROSENBERG, PETER SPADAFORA, WALTER TOMPKINS, STANLEY SALISBURY, M. ZOLTOWSKI, GERTRUDE ZOLTOWSKI, FRED COPE, CHARLES DAVIS, LITTLE DAVIS, FRED DE WEES, ALEXANDER GREY, SALVATORE IMPERATORE, LEO LOPEZ, MICHAEL LUCAS, HENRY MARRERO, ANDY MOORE, JOSEPH PIZZO, GERTH SAXTORF, ANTHONY SCHWARTZ and LEROY WOODRUFF,

Petitioners,

v.

GENERAL ELECTRIC COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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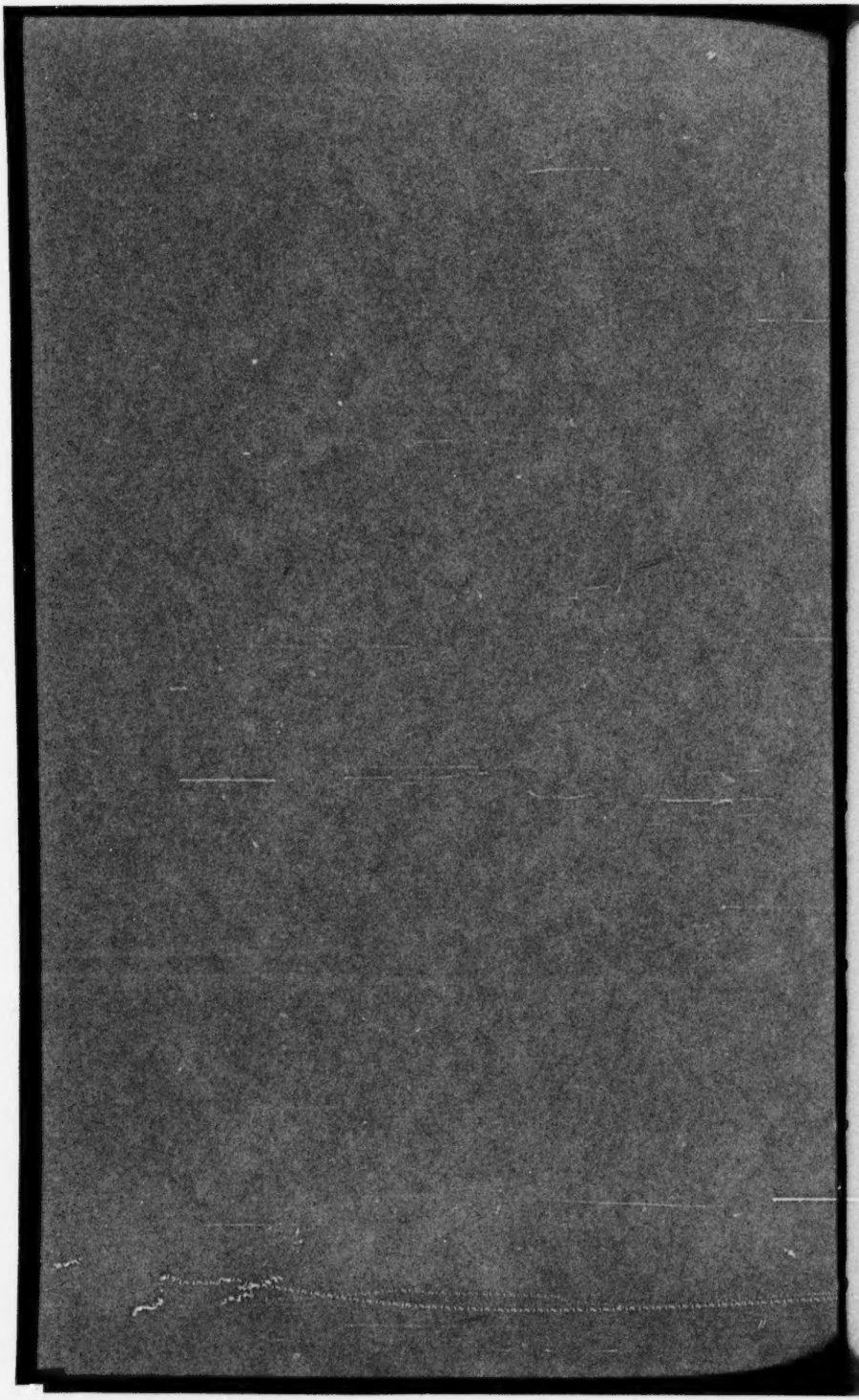

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No. 316

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

Petitioners * respectfully pray that a writ of certiorari issue to review final orders of the Court of Appeals of the State of New York entered on April 9, 1953.

Opinions Below

The opinion of the New York State Supreme Court is reported in 101 N. Y. S. 2d 46; the opinion of the Appellate Division of the Supreme Court is reported at 279 App.

* The decision of the New York Court of Appeals applied to two cases, *Cifolo et al.* v. *General Electric Company* and *Cope et al.* v. *General Electric Company*. Since this is a consolidated petition the cases below shall be designated as the *Cifolo case* and the *Cope case*. The petitioners are John Cifolo, Joseph Cisulo, Pierce Felpal, John Gabriele, Emil Konetsky, Louis Koutny, Stephen Labsky, Nancy Madonna, Alwandro Mazzucco, Stephen Mullen, Edward Reisinger, Philip Stagnitta, Walter Tuniszewski, Stanley Zalucki, M. Zombrowski and Gustave Zulke, Fred Cope, Charles Davis, Lyle Dean, Fred De Witt, Alexander Grey, Salture Jennings, Leo Luke, Michael Luzak, Henry Margeit, Atley Moore, Joseph Petti, Glenn Saxbury, Anthony Sherant and Leroy Woodruff.

Div. 517, 110 N. Y. S. 2d 759; the opinion of the Court of Appeals of the State of New York is reported at 305 N. Y. 209.

Jurisdiction

The final orders of the Court of Appeals were entered on April 9, 1953. On July 1, 1953 Justice Jackson extended the time for filing these petitions until September 5, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

Statutes Involved

The relevant provisions of the following statutes which are involved here appear in Appendix A, *infra.*

a) New York Workmen's Compensation Law, Sec. 3(2).
b) New York Workmen's Compensation Law, Sec. 11.
c) New York Workmen's Compensation Law, Sec. 39.
d) New York Labor Law, Sec. 200.
e) New York Labor Law, Sec. 299.
f) New York Labor Law, Sec. 310.*

Statement

A. Proceedings Below

The action in the Cifolo case was instituted by 16 individuals employed in the respondent's plant at Schenectady, New York. The complaint sought damages for partially disabling silicosis contracted in the plant by each of the petitioners as a result of the violation by respondent of the duties imposed upon it by Secs. 200 and 299 of the

* This statute applies only to foundries and hence is involved only in the Cope case.

Labor Law of the State of New York (AR. 15-19).* The action in the Cope case was initiated by 14 individuals employed in respondent's foundry at Elmira, New York. The complaint sought damages for partially disabling silicosis contracted in the foundry by each of the petitioners as a result of the violation by respondent of duties imposed by Secs. 200, 299 and 310 of the Labor Law of the State of New York (BR. 14-18). Without answering, respondent moved for judgments dismissing both complaints and each of the causes of action therein on the grounds that each of the said causes of action was legally insufficient, and that the court lacked jurisdiction of the subject matter of the actions. Following a hearing before the Supreme Court of the State of New York the motions aforesaid were granted.

The orders granting the motions to dismiss were affirmed by the Appellate Division of the Supreme Court of the State of New York with one justice thereof dissenting and by the Court of Appeals with two justices dissenting.

B. Statement of Facts

1. *The Cifolo case.* The complaint of petitioners, the allegations of which must be taken to be true (112 N. E. 2d at 202) contains 16 causes of action brought by 16 employees of the Schenectady plant of the General Electric Company. These employees were engaged in the production of porcelain products (AR. 15-56).

Each of the causes of action alleges violations by the respondent of the Labor Law of the State of New York, through the negligent operation by respondent of its plant facilities in respect to these 16 employees and respondent's failure to provide and maintain proper health and safe working conditions. It is alleged that the respondent failed to provide and maintain the necessary devices, equip-

* We thus refer to the record in the Cifolo case. The record in the Cope case is referred to as BR.

ment and processes essential to the protection of the lives, health and safety of workers laboring in the plant (AR. 16-17, 21, 23, 26, 28, 30, 33, 35, 37, 40, 42, 44, 47, 49, 51, 54).

Specifically, respondent neglected to maintain proper and sufficient ventilation and proper degrees of temperature and humidity, as well as prescribed devices and appliances for reducing the excessive heat in its factory and workrooms. The machinery was not equipped with proper hoods and pipes connected to exhaust fans of sufficient capacity and power to remove dust, gases, fumes, vapors, fibers, and other impurities; exhaust fans were not kept running continuously while machinery which releases and generates dust and other impurities is in use; suction devices which remove dust and other impurities at their point of origin by means of proper hoods connected to conduit and exhaust fans were not provided (AR. 18, 21, 23, 26, 28, 30, 33, 35, 37, 40, 42, 44, 47, 49, 51, 54).

Because of respondent's failure to comply with these statutes, dust, gases, fumes, vapors, fibres and other impurities, including free silica dust, were released in the workrooms of respondent's plant, and excessive heat was created. These dusts, gases, fumes, vapors, fibres and other impurities, including free silica dust, were concentrated in the air of the workrooms of the plant and created a danger to the lives, health and safety of petitioners. The excessive heat created in the workrooms of respondent's plant created a danger to the lives, health and safety of petitioners (*id.*).

Petitioners were employed by respondent for periods ranging from 8 to 25 years preceding March 22nd, 1950, and were constantly exposed to the hazard of free silica, a hazard created and continued by respondent's failure to comply with the labor law of the State of New York and by respondent's negligent action indicated above for from one to twenty-five years. As a result petitioners have during the course of their employment inhaled great quantities of dust and other impurities which have created the

injury and condition known as partially disabling silicosis (AR. 19, 21-22, 24, 26, 28-29, 31, 33, 35-36, 38, 40, 42-43, 45, 47, 49-50, 52, 54).

As a result of this condition petitioners have suffered extensive physical disability. Their health and bodily strength have been seriously impaired and their life expectancy reduced. Their resistance to disease has been wholly or partially destroyed with the consequence that they have been subject to many illnesses and infirmities. Extensive medical treatment has been required due to the loss of petitioners' resistance and will continue to be required in the future (AR. 19-20, 22, 24, 26-27, 29, 31, 34, 36, 38, 40-41, 43, 45, 47-48, 50, 52-53, 55).

The complaint further alleges that the specific disease and injury suffered by petitioners is not an injury or occupational disease within the meaning of the Workmen's Compensation Law of the State of New York and is not an injury or disease for which that law provides any basic liability or coverage by way of compensation benefits, medical benefits or otherwise. The Workmen's Compensation Law provides no remedy for the condition suffered by these petitioners. As a consequence petitioners instituted this action at law for damages resulting from respondent's negligence and violations of the labor law of the State of New York (*id.*).

2. *The Cope case.* The complaint alleges causes of action instituted by 14 individuals employed at respondent's Elmira, New York foundry (BR. 14-51). The allegations are substantially similar to those contained in the complaint in the Cifolo case.

C. The Nature of the Disease and Condition of Partially Disabling Silicosis

Medical authorities have long used the word silicosis as a generic term to denote various lung conditions arising

from the inhalation of free silica. Free silica is a crystalline matter and is chemically identified as silicon dioxide. The term silicosis, therefore, indicates the type of dust particularly involved, causing one of *many* lung conditions. There are in fact several different classifications of lung conditions arising from exposure to free silica, each being a separate, identifiable pathological entity. In certain of these diseases total disability may result, while in other types, either no disability or moderate disability only is the sequelae of the exposure to free silica.

The problems presented by the various diseases resulting from exposure to harmful dust are indeed important from the public health aspect in terms of the number exposed, the possibilities of contracting said diseases, and the effect upon exposure not only to the lungs but also other organs of the body. For those exposed to certain types of lung disease caused by contact with free silica, the mortality statistics are grimly high.

Using silicosis in its generic sense one finds that the exact number of those exposed to free silica has not been finally ascertained. As of 1940, 1,140,000 workers in the United States were potentially exposed to free silica dust and another 639,000 to mixed coal and silica dust (U. S. Public Health Bulletin #259). Taking into consideration the increase of working population in the United States and the movement of employees to various industries, one could approximate at the present time that more than 2,000,000 employees are exposed to silica and coal dust. This hazardous exposure arises not only in the foundry but in many other industrial activities wherein the material used in one form or another contains free silica.

Dr. Edgar Mayer (one of the members of the State Board of Chest Consultations for the State of New York) and Dr. Israel Rappaport have estimated that the incidence of clinical silicosis or pneumonoconiosis is 25 to 30% in the silica hazard industries and 15 to 20% in the mixed dust

hazard industries (Encyclopedia of Medicine, Surgery and Specialties, Vol. 8, 1951). These figures include the various type of lung disease and pathological entities identified by the generic term silicosis.

All analysis of mortality statistics among those exposed to silica point to the increased frequency of death from tuberculosis and associated lung infection among silicotics. A report based on a study of silicotics reveals that:

> "the occupations showing the highest ratios of actual to expected deaths from tuberculosis were in order: Underground lead and zinc miners, granite and sandstone cutters, copper miners and gold and silver miners.
>
> "All of these workers were exposed to a serious silica hazard. The ratio of actual to expected deaths from tuberculosis were respectively 1,833 per cent, 913 per cent and 804 per cent. There were actually 60 deaths from tuberculosis among these men as against six expected. Tuberculosis was responsible for one-half of all the deaths of lead and zinc miners, 29 per cent of the deaths of copper miners and 20 per cent of those among gold and silver miners. In all these three mining classes, deaths from tuberculosis exceeded deaths from accidential injuries. Among iron miners who are, on the whole, probably less exposed to silica dust than are the other mining classes mentioned, we find that the ratio of actual to expected tuberculosis deaths is only 260 per cent. There were 16 deaths from tuberculosis among granite cutters as against 1.7 expected."
>
> (Lanza, A. J. and Vane, R. J.: "The prevalence of silicosis in the general population and its effects upon the incidence of tuberculosis" (Am. Rev. Tuberc. 29, 8, 1934.)

Similarly, Dr. L. G. Irvine, in the 1929 report of the Miners Pthisis Medical Bureau, said:

> "A measure of the extent of the predisposition to tuberculosis in cases of silicosis is afforded by the fact that of all deaths that had occurred (among 1,623 silicotics), some 75 per cent have been due directly to tuberculosis."

A comparative analysis made by E. L. Collis and G. U. Yule revealed that there are definitely increased ratios of diseases of the heart, gastro-intestinal tract and kidneys among those exposed to silica. So striking was the difference that they declared silica to be a general body poison similar to lead. (Collis, E. L. and Yule, G. U., "The mortality experience of an occupational group exposed to silica dust, compared with that of the general population and an occupational group exposed to dust not containing silica" Jour. Ind. Hyg. 15, 395, 1933.)

The gravity of the problem of silicosis indicated by the widespread incidence and attendant complications of the disease is enhanced by the fact that it is not reversible and curable by any treatment known so far.

The disease is not, however, an inevitable accompaniment of employment in dust hazard industries. Available means of preventing hazardous dust concentration in the air inhaled by the worker include wetting processes to precipitate the dust at its point of origin; exhaust ventilation to constantly reduce the concentration of dust at its point of origin; use of masks and respirators by workers exposed to inhalation of dust where its concentration is not reducible to safe levels; substitution of non-silicosis-producing material in industrial processes, such as the use of metal abrasives instead of sand; and enclosure of dusty processes.

Apart from the prevention of dust disease through the radical elimination of dust hazards in industry, to the person already affected by the disease the only courses open are removal from exposure to further inhalation of dust and prevention of complicating infections. Little can be done for a worker suffering from totally disabling silicosis.

Improvement in the lungs' self-cleansing efficiency may be expected, concurrent with reduction of exposures, to rid one of much dust which would otherwise lead to further aggravation. In cases affected by one of the distinct types

of the disease associated generally only with partial disability, limitation of exposure significantly limits that type of lung pathology.

The most detailed and recent classification of the differing types of silicosis has been made by Dr. Lewis Gregory Cole, former president of the American Roentgen Ray Society and Professor of Roentgenology at the Cornell Medical College, in *Lung Dust Lesions versus Tuberculosis* (1948). Dr. Cole distinguishes six types of diseases emphasizing again and again the distinct and separate character of each. Thus, in the introduction of his classification he declares, at page 113:

> "This great variety in the roentgen findings means that the morbid changes *are* different, and * * * that the clinical findings and the social and economic problems of each of these typs are also different." (Emphasis in original.)

And again, at page 141:

> "The three types of lesions—vesicular, nodular and tuberculoid—constitute different pathological entities, run different courses, and present different social and economic problems."

As the statement above reveals, the term silicosis encompasses varying lung diseases, wherein different pathological changes take place with differing degrees of disability. Dr. Cole in his findings has set forth the varying kinds of lung diseases resulting from exposure to silica dust.

Dr. Cole identifies as Type I the *peribronchial-perivascular lymph node manifestation* (Pan-coast) manifested roentgenologically by accentuated hilar and linear markings. These are due to deposits of dust, dust-laden phagocytes and collagen which are laid down as sheaths surrounding the larger and medium-sized bloodvessels and bronchi. In the vast majority of cases these morbid changes cause moderate symptoms.

Type II is the *vesicular* type. While in Type I dust, dust-laden phagocytes and collagen form sheaths around the larger blood vessels and bronchi, in Type II, they do so around the smaller blood vessels and bronchi and in the tissue of the lung between the end lung lobules. Dr. Cole divides cases of this type into three subdivisions:

(a) those which are more closely associated with the *peribronchial-perivascular type;*

(b) those where the roentgenograms have a ground glass appearance, more closely associated with the *parenchymal* type; and

(c) those manifested by a coarse granular appearance that is more closely associated with the *nodular* type.

Dr. Cole points to the fact that roentgenologists have often recognized a difference between findings of this type and of the nodular type, using such terms as "fine nodulation" and "ground-glass appearance" to designate them.

Type III is the *nodular* type of lung dust lesion, evidenced by small, round, clear-cut shadows that bear no relationship to the blood vessels and bronchi. These shadows are caused by collagen laid down in whorls like the layers of an onion.

Type IV is called *tuberculosis pneumonoconiosis.* Its roentgenological and pathological findings look like pulmonary tuberculosis but is not of *bacillus* origin. Like tuberculosis it has two varieties: acute or rapidly developing and chronic or slowly developing. The advanced stages of the latter are evidenced by massive lesions.

Type V is the *cystic* or "pockmarking" type, which is manifested by air cysts formed by the dilation of the terminal lung lobules. Bronchioles and terminal air passages are compressed by deposit of collagen laid down in the form of whorls or laminae in such a manner that they have

a ball-valve action, allowing air to be drawn in, while there is not sufficient elasticity of the lung to expel it.

Type VI is called *parenchymal pneumonoconiosis.* It is the acute or rapidly developing type of silicosis. It is evidenced roentgenologically by a general haze or cloudiness which obscures the normal markings of the lung. This is caused by the incomplete filling or consolidation of the air cells and passages. Collagen deposits in any form are relatively absent and the lack of this protective mechanism tend to allow the lesion to progress rapidly to a fatal determination.

The classifications referred to above clearly reveal silicosis is not an entity in itself, but rather a general name applying to distinct and separate diseases, some of which are associated with total disability and even inevitable resultant death, whereas others are associated with symptoms incurring no or partial disability.

In referring to *massive conglomerate fibrosis,* Dr. L. U. Gardner wrote in the Journal of Industrial Hygiene and Toxicology of March 1937:

> "* * * In the conglomerate type of reaction there is often massive emphysema with large bulbous blebs along the free borders of the lungs. Pleurisy may also be considered a complication of both form of simple silicosis but in the discrete type the pleural reaction is restricted to the surface of individual nodules. Adhesions do not develop. When a conglomerate focus of fibrosis impinges on the pleural surface more extensive dense fibrous adhesions develop."

On the complication of emphysema, Mayer and Rappaport wrote:

> "* * * severe emphysema is usually found in association with conglomerate and confluent fibrosis of silicosis, tuberculosilicoses, anthrasilicosis, asbestosis, etc. Much lesser areas of emphysema are observed in discrete nodular fibrosis of simple silicosis depending of course on the density of the lesions" (Encyclopedia of Medicine, Surgery & Specialties).

In *Silicosis and Its Prevention,* by Adelaid Rose Smith, Special Bulletin, No. 198, 1946, New York State, Department of Labor, scientific data are presented describing the pathological condition of the silicotic lungs and the high susceptibility to tuberculosis and other diseases:

> "It seems possible, in view of the statistical analysis made by Collis and Yule, that the presence of silica in the body in undue amounts not only predisposes to pulmonary tuberculosis, but has an unfavorable effect on other organs. Comparing mortality statistics in a large group of industrial workers exposed to silica dust with another industrial group not so exposed and with the general population, they found definitely increased rates for diseases of the heart, gastro-intestinal tract and kidneys among the former" (p. 14).

> "In addition to tuberculosis and pleurisy, which are the commonest and the most important complications of silicosis, certain other associated conditions are of interest. A tendency to recurrent chest colds with prolonged cough is rather characteristic. Some authorities believe that chronic bronchitis is present in all cases where the disease is well advanced. * * * Bronchiectasis, lung abscess and gangrene occur frequently in hard-rock mines, according to Prooke and Sayers, who believe that prolonged inhalation of silica dust contaminated with organisms from the mouth, paves the way for bacterial attack upon the bronchial mucous membranes. Emphysema is a common complication of silicosis and tuberculosis" (pp. 39-40).

The association of complications further emphasizes their separate and distinct character. Dr. Henry K. Pancoast and Dr. Eugene P. Pendergrass in the Journal of Industrial Hygiene of May, 1933, specifically taking issue with the old classifications wrote in connection with what they termed the *perivascular-peribronchial* lymph node type:

> "There may be some excuse for continuing to call this the first stage, but continued experience with cases of pneumonoconiosis developing in various industries

has led us to question the wisdom of designating any appearance of pneumoconiosis by any term denoting numerical stages of progress. In this particular instance under discussion the individual may develop the appearance in a comparatively short period of from 1 to 5 years, or not pass beyond it, on the other hand, in fifty years. Moreover, it is not apt to be distinguishable as a stage of the past in more progressive period of the condition, and in some industries it may be insignificant or indistinguishable as a state at all. We prefer to designate the appearance by a term which implies its pathological nature and to call it not a stage but the *perivascular-peribronchial* lymph node type or preponderance of the condition."

Referring to the *nodular type,* they stated:

"It is conspicuous by its absence or insignificance, however, in many industries, notably the granite cutter, sandblaster, sandstone, and asbestos workers. It is especially likely to be absent or inconspicuous in those who are developing silicosis rapidly, such as in those working with pulverized sand without adequate protection.

"If this appearance is absent or nearly so as a stage of progress in so many industrial silicoses, why designate it as a numerical stage of progress at all?"

Qualitative differences exist between the various types. They have in common with each other solely their origin in silica dust and the body organ that they affect.

The varying types of lung pathology generally identified as silicosis including those causing partial disability and usually referred to as partially disabling silicosis are fraught with shocking destructive consequences for the worker or his family. To the afflicted worker it means a serious loss of health, a sharp reduction of resistance to many other diseases, constant and expensive medical treatment and hospitalization and a decided lessening of life expectancy. To the worker's family it means an impairment of economic support and livelihood, the heavy burden of

medical expenses and the ghastly prospect of observing slow and insidious and inevitable decay of husband or parent.

The existence of the varying types of lung pathologies or diseases with the varying resultants upon the affected worker and the concomitant disabilities, either partial or total, must be considered in evaluating the questions posed by these petitions. These scientific facts have specific bearing in determining whether or not the Workmen's Compensation Law is an exclusive remedy for certain diseases not encompassed by the terms of the statute.

Question Presented

The court below construed Section 3(2) of the New York State Workmen's Compensation law to deny petitioners a compensation remedy for silicotic injury or injury caused by other dust diseases except where the injury results in total disability or death. It likewise construed Section 11 of the statute to bar relief at common law for such injury even though the injury resulted from and was in the course of employment and even though it was caused by the employer's negligence and violation of duties created by statute to prevent the very injury which petitioners suffered. The question thus presented is whether the New York State Compensation law as construed to deny petitioners both a statutory and a common law remedy is valid under the Fourteenth Amendment to the Constitution.

Reasons for Granting the Writ

1. It is clear that, absent the New York Workmen's Compensation statute, petitioners would enjoy a common-law remedy for the substantial injuries which they have suffered. If the State of New York had eliminated this remedy outright, there would be a plain denial of due

process of law under the Fourteenth Amendment. See, for example, *Truax* v. *Corrigan,* 257 U. S. 312.

2. The Workmen's Compensation system makes compensable only those injuries incurred in the course of employment which are industrially disabling, whether temporarily or permanently. Where basic compensation coverage is extended, compensation relief is exclusive and the common-law remedy is superseded. The identifying characteristic of the compensation system is that it substitutes for an unfair, unadministrable and haphazard common-law remedy a system which relates in a rational and meaningful way the remedy for industrial injury to the central fact of the worker's life—his earning power. Indeed it was this "fair exchange" which originally persuaded this Court to give its constitutional blessing to the compensation system when it was in its infancy. Thus, in upholding Section 18 of the New York Constitution in *N. Y. Central R.R. Co.* v. *White,* 243 U. S. 188 (1917), this Court expressly pointed out that it upheld the section upon the assumption that while remedies were changed, none were taken away.

> "Nor is it necessary for the purposes of the present case to say that a state might without violence to the constitutional guaranty of 'due process of law' suddenly set aside all common law rules respecting liability as between employer and employee without providing a reasonably just substitute. Considering the vast industrial organization of the State of New York, for instance, with hundreds of thousands of plants and millions of wage earners, each employer on the one hand having embarked his capital, and each employee on the other having taken up his particular mode of earning a living in reliance upon the probable permanence of an established body of law governing the relation, it perhaps may be doubted whether the state could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it" (at p. 201).

Indeed, the Court felt it necessary to insert a similar caveat later in the same opinion:

> "This is not to say that any scale of compensation however insignificant on the one hand or onerous on the other would be supportable" (p. 205).

See, also, *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, 241.

3. Where, as here, there is no basic compensation coverage in the sense in which we have used this term—i.e., for industrial injury resulting in loss of earning power—it is well settled that the common law remedy remains.

The leading case is *Barrencotto* v. *Cocker Saw Co.,* 206 N. Y. 139 (1935).

In that case a workman claimed that he had contracted a silicotic disease condition in the course of his employment due to his employer's negligence. At that time Section 3, subdivision 2, of the Workmen's Compensation Law specifically covered twenty-seven (27) occupational disease conditions, but failed to list or specify the particular silicotic injury. The New York Court of Appeals sustained the workman's right to maintain an action at law for damages, holding that Section 11 of the Workmen's Compensation Law did not bar workers' suits for damages against their employers when the particular injury was not covered by compensation liability.

Speaking for a unanimous Court, Justice Lehman stated (at pp. 145 and 146):

> "Here the action is brought for an industrial injury entirely outside the scope of the statute. The statute provides that the statutory benefits for injury or death shall be exclusive and in place of any other liability 'on account of *such* injury or death' (court's emphasis). By no construction, even though forced, can these words be found to mean that the right to compensation in case of certain injuries should be exclusive and in place of liability for other injuries. * * *

"* * * There still is a field in which the statute fails to impose liability, on the part of an employer, to provide compensation for injury or death, regardless of fault; and in which an injured person may seek damages by action at law, where there has been fault."

Horowitz on *Workmen's Compensation* refers to this rule and states (at pp. 321-322):

"The compensation statute is a complete replacement or substitute for the common law *on the subject which it covers and so far as it goes.* But it does not effect rights or wrongs not within its purview, or which by implication or express negation are excluded. Thus, where the injured employee or dependent is not entitled to Workmen's Compensation under the act, the act cannot be used to deprive him of pre-existing or other common-law or statutory rights. * * * *The Compensation Act should not be interpreted to take away common law or other* rights and give nothing in return. * * *" (Italics ours.)

As stated in 3 *Duke Bar Association Journal,* 96 (1935):

"The employee should not be made to suffer by giving up all his common law rights for an incomplete system of compensation * * *."

See also, *Workmen's Compensation Act—Bar of Common Law Recovery for Non-Compensable Injuries,* 14 North Carolina Law Review 199.

The underlying rationale of this fixed proposition that the Workmen's Compensation Law constitutes the "exclusive remedy" only with respect to those particular injuries within the basic liability scope of the statute was analyzed cogently by the Minnesota Supreme Court in *Donnelly* v. *Minneapolis Manufacturing Co.,* 161 Minn. 240, 201 N. W. 305 (1924):

"* * * the compensation law, so far as it covers the field of rights and remedies as between employers and employees, is exclusive. * * * The statute is a substitute for the common law on the subject which it covers

and so far as it goes. But it does not affect rights and wrongs not within its purview, or which by implication or express negation are excluded" (at p. 243).

"* * * the humane and progressive purpose of the compensation law does not permit the denial of all remedy to employees who contract non-compensable diseases through the negligence of their employers, particularly the violation of a statute intended for the protection of employees * * *" (at pp. 244-245).

It must moreover be pointed out that the cases relied upon by the court below (*Matter of Sweeting* v. *American Knife Co.*, 226 N. Y. 199; *Farnum* v. *Garner Print Works & Bleachery*, 229 N. Y. 554; *Matter of Gorle* v. *Alfred E. Joy Co.*, 230 N. Y. 595) all provide for basic compensation liability and hence do not support the court's endorsement of the constitutionality of a dual denial of compensation and common-law remedies.

4. In analogizing petitioners' plight to that of the injured worker who in certain cases is forced to wait for seven days before he receives compensation relief (*Matter of Gorle* v. *Alfred E. Joy Co., supra*) or who cannot recover for pain and suffering (*Sweeting* v. *American Knife Co., supra*) the court below, as we have noted, ignores the fact that there is, in both these cases, basic compensation coverage. And can these deprivations be seriously compared to the permanent injuries to body and mind resulting from the ravages of an incurable disease? Nor can these permanent injuries be divorced from earning power for the steadily weakening effects of petitioners' condition sharply impair earning power.

5. Nor is it a justification, constitutional or otherwise, for suppression of this substantial right to urge that relief will be approved at the time of permanent disability. It is simply unsound law to suggest that the victim of wrongdoing is to be denied relief until he suffers more. As Judge

Conway wrote in his dissenting opinion * (211 N. E. 2d at 203):

> "The mere statement of the thought is its refutation for it would be monstrous to say that such sufferers were to be economic derelicts and without aid from any source as they coughed their way to total disablement. To so hold would be violative of * * * the Fourteenth Amendment to the United States Constitution."

Nor has the point any factual basis. We have already established that the term "silicosis" is purely a generic term and covers various types of lung diseases or pathologies, each of which has its distinctive characteristics as evidenced by X-ray, each has its distinctive symptomatology and each has its unique sequelae including the nature of the resultant disability.

Since we are not dealing with the kind of injury which necessarily produces physical consequences of a "progressive" character leading ultimately to total industrial disability, the availability of a compensation remedy at that ultimate stage can in any case not justify the statutory suppression of petitioners' common law rights.

6. The compensation system was adopted to avoid the social risks of industrial injuries and gained constitutional acceptance for that reason. In this case it has become an instrument for achieving the very objective it was intended to prevent. Limitations upon common-law recovery for injuries of the sort involved here have already made their way into the statutes of thirteen States. 112 N. E. 2d at 200. As the court below noted, approving opinions have been rendered in two cases. *Masich* v. *United States Smelting, Refining & Mining Co.*, 113 Utah 101, appeal dismissed 335 U. S. 866, and *Moffett* v. *Harbison-Walker Refractories Co.*, 339 Pa. 112. But in both these cases, as in the instant case, vigorous dissents were entered.

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* The dissent was joined by Judge Lewis who has since become Chief Judge of the Court of Appeals.

The problem presented here is one of pressing importance —particularly for thousands of employees in the extractive industries and foundries. It should be reviewed by this Court.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

September 3, 1953.

Respectfully submitted,

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APPENDIX A

Statutes Involved

New York Workmen's Compensation Law, Section 3(2)

"*Occupational Diseases.* Compensation will be payable for disabilities sustained or death incurred by an employee resulting from the following occupational diseases.

Col. One	Col. Two
Description of Disease	*Description of Process*
28. Silicosis or other dust diseases resulting in total disability or death.	28. Any process involving exposure to silica or other harmful dust."

New York Workmen's Compensation Law, Section 11

"*Alternative remedy.* The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

New York Workmen's Compensation Law, Section 39

"Right to Compensation. If an employee is disabled or dies and his disability or death is caused by one of the diseases mentioned in the subdivision two, Section Three, and the disease is due to the nature of the corresponding employment that it describes in such subdivision in which such employee was engaged and was contracted therein, he or his dependents shall be entitled to compensation for his death or for the duration of his disablement in accordance with the provisions of Article Two except as hereinafter stated: providing, however, that compensation shall not be payable for partial disability due to silicosis or other diseases * * *."

New York Labor Law, Section 200

"General duty to protect health and safety of employees. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein. The board shall make rules to carry into effect the provisions of this section."

New York Labor Law, Section 299

"Ventilation, heating and humidity.

1. Every work room in a factory shall be provided with proper and sufficient means of ventilation, natural or mechanical or both, as may be necessary, and there shall be maintained therein proper and sufficient ventilation and proper degrees of temperature and humidity at all times during the working hours. If owing to the nature of the manufacturing process carried on in the factory work room excesssive heat be created therein, there shall be provided, maintained and operated such special means or appliances as may be required to reduce such excessive heat.

2. All machinery creating dust or impurities in quantities tending to injure the health of employees shall be equipped with proper hoods and pipes connected to an exhaust fan of sufficient capacity and power to remove such dusts or impurities; such fan shall be kept running constantly while such machinery is in use. If the board decides that such apparatus is unnecessary for the health and welfare of the employees, or that other means of protection may be provided to safeguard the health and welfare of the employees against such injurious dusts or impurities, it may adopt rules excepting such machinery from the operation of this sub-division, or prescribing such requirements as will effectuate the intent of this subdivision.

3. If dust, gases, fumes, vapors, fibers or other impurities are generated or released in the course of the business carried on in any workroom of a factory, in quantities tending to injure the health of the employees, suction devices shall be provided which shall remove such impurities from the workroom, at their point of origin where practicable, by means of proper hoods connected to conduits and exhaust fans. Such fans shall be kept running constantly while the impurities are being generated or released."

New York Labor Law, Section 310

"*Foundries.* Foundries shall conform to the provisions of this chapter relating to factories and also to the following requirements:

"1. Entrances and windows shall be constructed and maintained so as to minimize drafts.

"2. Gangways shall be constructed and maintained of sufficient width to make the use thereof by employees reasonably safe and shall not be obstructed during the progress of casting.

"3. Smoke, steam or gases generated in foundries shall be effectively removed therefrom in accordance with rules adopted by the board. The milling and cleaning of castings and the milling of cupola cinders shall be done under such conditions to be prescribed by the rules of the board as will adequately protect the employees from dust. The use of heaters discharging smoke or gas into the work rooms is prohibited except that open fires may be used under conditions prescribed by the board in its rules. Suitable provision shall be made for drying the working clothes of employees.

"4. All apparatus, tools, implements and equipment shall be kept in proper condition and repair.

"5. A first aid kit shall be provided for the use of employees in case of burns or accidents.

"6. Where ten or more persons are employed (a) there shall be provided suitable and convenient wash rooms adequately equipped with hot and cold water. Such wash rooms shall be kept clean and properly heated. (b) Lockers shall be provided for the employees' clothing. (c) If outside watercloset or privy accommodations are permitted by rules of the board, they shall be properly heated and the passageway leading from the foundry thereto shall be so constructed and protected that employees using the passageway shall not be exposed to the outdoor atmosphere."

Constitution of New York, Article 1, Section 18

"Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to

fault as a cause thereof, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer."